

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

-----X
NEXTEER AUTOMOTIVE CORPORATION,

Respondent,

and

CASE 7-CA-215036

LOCAL 699, INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, UAW,

Charging Party.

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POST-HEARING BRIEF OF CHARGING PARTY

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I. INTRODUCTION

Joshua Nuffer-Bauer (“Bauer”) was discharged by Nexteer Automotive Corporation (“Nexteer”) in violation of National Labor Relations Act (“NLRA”) Sections 8(a)(1), (3), and (4). Bauer is a vocal, passionate, and, at times, confrontational union representative with whom Nexteer was simply tired of dealing. Nexteer attempted to suspend Bauer for 30 days, for telling a supervisor “fuck no” and/or “fuck off” during a conversation about disciplinary interviews. Bauer filed Unfair Labor Practice charges and, after a complaint issued, Nexteer agreed to settle those charges by rescinding the discipline. About four months later, Nexteer discharged Bauer under remarkably similar circumstances. During a meeting with supervisors to discuss workplace issues, the meeting became heated, Bauer stood up, said “fuck you” to one of the supervisors, and then left the room. Bauer then continued to report to work for a week, until he was terminated for violating the workplace violence policy and a work rule prohibiting “assaulting, threatening, or intimidating” supervision.

Nexteer terminated Bauer for activity that is protected by the NLRA. That is, vigorously discussing workplace issues with management. Bauer’s standing, swearing, and then leaving the meeting is not sufficient to remove the protected status of his actions.

Alternatively, Nexteer terminated Bauer for previously pursuing Unfair Labor Practice charges against it. Nexteer cannot meet its burden of showing that it would have taken the same action, absent Bauer’s protected conduct. This is because Nexteer either skipped the progressive discipline procedure, issuing a termination for a (relatively minor) first offense, or it impermissibly considered prior disciplines which had rolled off Bauer’s employment record. Further, Nexteer deviated from its own practice by allowing Bauer to remain in the workplace

for a week, even though he was being accused of severe workplace violence or threatening behavior.

For these reasons, Nexteer has violated the NLRA by discharging Bauer. The Charging Party requests the remedies requested in the Complaint along with any other appropriate relief.

II. FACTS

A. Nexteer is an industrial facility where swearing and labor-management confrontations are common and explicitly acknowledged in the CBA.

Nexteer is an automotive parts manufacturer located in Saginaw, Michigan. It manufactures drive shafts and other parts for General Motors and other automobile manufacturers. Tr. 17 (Bauer). It employs approximately 3,200 production and maintenance employees throughout seven separate plants in Saginaw. Tr. 20, 29 (Bauer). Those employees are represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 699 (collectively the “Union”). GC Ex. 2.

Perhaps unsurprisingly, this large manufacturing setting can be rough and tumble. Swearing, by unit employees and management, is a frequent, daily occurrence. Tr. 40-41 (Bauer), 65 (Frost). As Bauer testified:

Q. Okay. And how often do you hear swearing in the workplace?

A. Every day, often.

Q. And how often do you hear swearing from supervisors?

A. Quite a bit. I mean and it's, you know, it's just common shoptalk, as we call it, because it just – from general stuff about, you know, a machine being a piece of shit to the day sucks, with obviously vulgar words in between all that, to personal things. We're just having general conversations because, you know, we do spend so much time together, people get comfortable, and with the freedom of shoptalk, it is a common occurrence inside the plant.

Q. So are those vulgarities ever directed at someone?

A. At somebody in a like -- at someone in a way to offend them or -- I mean not to offend but to attack them? No. I guess, yeah, because I've been told, fuck off. I've been told, get the hell out of the office. Been called an asshole, so yeah, I guess it goes every way, and I mean it goes both ways. For them -- for me to just say management only does it, that wouldn't be right, so we go both ways on that one.

Tr. 40-41 (Bauer). Employees are rarely disciplined, let alone discharged, for swearing. Tr. 41 (Bauer), 66 (Frost).

Aside from the frequent salty language at Nexteer, labor-management relations are contentious, which leads to frequent confrontations. As Bauer puts it:

. . . Obviously, because we deal with people's lives and issues within this contract, at times it did get a little heated, but for the most part we were able to resolve a lot of issues on the floor with and without writing or a grievance form.

Q. Okay. You mentioned that it gets heated. In what way?

A. Oh, there'll be arguments in the office. You know, both parties will be yelling at each other because it's -- or cutting each other off or, you know, sometimes we decide to start swearing at each other, just would -- you know, because it is -- it becomes personal kind of, I guess, because you're arguing a certain side and you both -- I mean they're passionate about their side. I get where -- and I get that because I'm passionate about my side. But, you know, it -- but over the end of the day, we would sometimes take breaks and get back together to resolve these issues, and we usually could resolve those issues after we had spent time.

Tr. 19-20 (Bauer). Allison Bell ("Bell"), a six-year HR professional at Nexteer, admits that, "at times" people get agitated at labor-management meetings, and that the normal practice is to exit the meeting and reconvene at another time. Tr. 92 (Bell).

In fact, the issue is so prevalent that the 2015 collective bargaining agreement between Nexteer and the Union ("CBA") contains a "cooling off" provision:

The Union expressed concern that some disciplinary interviews escalated into confrontation because tempers flared. The Union suggested that in these situations a "Cooling Off" period would be beneficial to all concerned.

The Company and the Local Union agreed that contemplated discipline should be discussed in a calm manner allowing for an objective evaluation of the facts. In those situations where emotions preclude this from happening, the parties agreed

that as a matter of practice and when possible such discussions should be postponed until such time that, in the opinion of Management, a constructive exchange of information could occur.

GC Ex. 2, p. 31. The provision goes on to note that “assault or other serious acts of misconduct would render the ‘cooling off’ period totally inappropriate.” However, the section, as a whole, shows that the parties expect situations during labor-management meetings where “tempers flare” and “emotions preclude an objective evaluation of the facts.” The contract thus tolerates such outbursts by providing for a solution when they arise.

B. At the time Nexteer terminated him, Bauer had over six years of seniority, was an elected union representative, and had no discipline that Nexteer was permitted to consider.

Bauer was hired on June 16, 2011. Tr. 17 (Bauer). Three and a half years ago, he was elected by the Local Union membership to serve as District 13 Committeeperson which represents Plants 6 and 3 on the third shift. Tr. 17 (Bauer). District Committeeperson is a full-time position, the responsibilities of which are to “address issues between management and the employer on the floor that are contractual disputes or just concerns of the floor.” Id.

At the hearing in this case, Nexteer spent a great deal of time focusing on Bauer’s prior disciplines. R Ex. 8-16. However, the CBA is very clear that none of those disciplines should have been considered in deciding whether to discipline or terminate Bauer in December 2017:

In imposing discipline on a current charge, Management will not take into account any prior infractions which occurred more than twenty-four months previously. Further, Management will eliminate from an employee’s record any infraction where there was a lapse of time of greater than 18 months between infractions provided the employee has not been on leave of absence the majority of the time between the infractions.

GC Ex. 2, p. 32. This period can be further reduced by agreement of the parties. See e.g. R Ex. 11, 13, and 15 (where the parties agree, as part of the grievance settlement, to remove the infraction from Bauer’s file earlier than twenty-four months. These are being offered only as

examples of the procedure for early removal. They did not occur within twenty-four months of December 2017.). None of the disciplines raised by the employer occurred within twenty-four months of December 2017. As such, when Nexteer terminated Bauer, he had a clean employment record in terms of discipline that it was actually allowed to consider.

C. Nexteer attempted to suspend Bauer for 30 days in violation of the NLRA, then began retaliating against and harassing him for filing unfair labor practice charges.

On August 15, 2016, Nexteer issued a 30-day disciplinary suspension to Bauer for an incident that occurred on August 2, 2016, in which Bauer used the word “fuck,” in passing, while discussing workplace issues with a supervisor. GC Ex. 3. Nexteer stated that Bauer violated Shop Rule 13 which prohibits “abusive language to supervision or other employees.” Id. Bauer described the event that led to the discipline:

I had met with the general -- Supervisor Mark Lorence that day to serve grievances, and he wanted to do something else, but I was running really behind that night, and I told him I could meet with him tomorrow because he wanted to do [disciplinary] interviews with an employee. We went back and forth arguing about it. He told me he was going to email everybody to include [Area Manager] Benny Taylor, [HR Manager] Dereon Pruitt, and such and we -- I said I don't care. And we went back and forth. He says, well, I'm just going to do them without you. I said done -- if they, you know, remove their union representation you can, but per our contract, management has to offer union representation to the employee. He goes, well, I'm still going to do them with or without you. I'm going to send all these emails. I said, well, the response is still going to be fuck no, and I walked out of the office.

Tr. 21-22 (Bauer). Since the discipline clearly stemmed from a discussion over workplace issues of grievance handling and when to hold disciplinary interviews, Bauer believed that his rights under the NLRA had been violated. He filed a grievance and an unfair labor practice charge. Tr. 21-22 (Bauer). After a complaint issued on the charge, Nexteer agreed to settle the matter by, among other things, rescinding the discipline, reinstating Bauer with backpay, rescinding certain other shop rules, and posting a notice. GC Ex. 4-5.

After Nexteer posted the notice, management was defiant, dismissive, and contemptuous toward the settlement and toward Bauer himself. During grievance meetings, supervisors would tell Bauer, that “they did not care about the settlement and they were going to do what they had to do.” Tr. 24 (Bauer). Management, including Dan Storm, Tony Follo, and Benny Taylor began to tell him things like his “grievances were bullshit,” he was “just being an asshole,” and that he “better watch out” or else he will be “thrown out of the plant.” Tr. 24, 45 (Bauer).

The situation eventually got bad enough that Bauer felt that he needed help getting his grievances heard. On October 2017, he approached JoAnn Reyna Frost (“Frost”), who has twenty years of seniority and seven years of experience as an elected union representative. Tr. 61 (Frost). At the time, she was the Shop Committeeperson which is a step above Bauer in the Local Union’s organization. Tr. 24 (Bauer). Bauer explained to Frost that he was being threatened with expulsion from the plant and that his grievances were not being taken seriously. Tr. 25 (Bauer), 62 (Frost).

Frost’s initial reaction was to document the situation. She suggested that Bauer “set up meetings in Google calendar. That way we could have a paper trail of them refusing to meet with him, and if that continued, then we could take it to higher management and try to get resolution through that process.” Tr. 62-63 (Frost). Less than two weeks later, Bauer informed Frost that the situation had not improved, so she set up a meeting with HR Manager Dereon Pruitt (“Pruitt”). Tr. 63 (Frost). A meeting was scheduled for November 2017. The attendees were to be Bauer and Frost from the Union, and Pruitt and Bell from Nexteer. Tr. 25 (Bauer), 63 (Frost).

At the meeting, Pruitt revealed the true reason why Bauer was having trouble getting his grievances heard by making two comments on Bauer’s previous NLRB activity. As Bauer testified at the hearing, “the first comment was that nobody wants to communicate with me

because of the fact that they don't want to end up in front of the NLRB,” and the second comment was that Pruitt said “he couldn't believe that I went to the NLRB because of he had reached agreement settlement, which we didn't know about.” Tr. 28 (Bauer). Frost corroborated Bauer’s recollection of this meeting. She testified that Pruitt said he was not surprised that the supervisors would not talk to Bauer because “they’re afraid that they would end up down in Detroit in front of the Labor Board.” Tr. 64 (Frost). Frost also noted that Bell commented, at the meeting, that “when she hears the name Josh Bauer, she thinks NLRB.” Tr. 64 (Frost).

The result of the meeting was that Pruitt recommended having a follow up meeting between Bauer, Bell, and Area Manager Benny Taylor (“Taylor”) to discuss the issues that Bauer needed to be addressed.

D. Bauer’s emotions run high while discussing workplace issues in the meeting between Bauer, Bell, and Taylor.

The meeting between Bauer, Bell, and Taylor was scheduled for December 13, 2017. Tr. 29 (Bauer). It was to take place in Bell’s office, which was small, and contained a large desk and two chairs for visitors. Tr. 30 (Bauer).

Bell was late to the meeting, forcing Bauer and Taylor to wait for her. Tr. 31 (Bauer). They passed the time by sitting outside her office, discussing friendly topics like dog training and other “personal stuff.” Id. The wait apparently bothered Taylor because he was frequently checking his phone and remarked that his schedule was tight because of a meeting he had directly after this one. Id. Bell and Taylor even argued about the date and time of the meeting when she arrived. Id. As they all entered Bell’s office, Taylor sat between Bauer and the door. Tr. 30 (Bauer). After they all entered, the door was closed. Tr. 32 (Bauer).

The meeting began with an exchange of pleasantries, and then quickly turned to discussing workplace issues. Tr. 32 (Bauer). As Bauer describes it, he was trying to “run down a

summary” of what his issues were. Id. In the ten minutes that the meeting lasted (Tr. 93 (Bell)), Bauer listed quite a few subjects including management performing union work and other staffing issues (Tr. 32 (Bauer), 78 (Bell)), and health and safety issues. Tr. 34 (Bauer), 77 (Bell). Taylor, stated that he understood that Bauer was addressing the concerns of Union members. Tr. 113 (Taylor). The health and safety issues included a recent incident where a production employee had vomited on herself while working on the line and Taylor did not address the situation to Bauer’s satisfaction. Tr. 34-35 (Bauer), 76-77 (Bell). As the meeting progressed, Bauer and Taylor began “cutting each other off and not letting each other speak.” Tr. 34 (Bauer). Because they were “stepping over each other and not allowing each other to speak and getting quite loud,” Bell told Bauer and Taylor to both calm down. Tr. 36 (Bauer).

The meeting ended with the discussion of the vomiting employee. It was a topic that Bauer was passionate about and felt that Taylor had not handled properly. As Bauer describes, when he raised the issue, “Benny [Taylor] raised his hands up and said, this is why we can't get anything done on third shift; he's just so hostile. And at that point I got out of my chair and said, this meeting's over. Really, Benny, go fuck yourself. And I walked out of the office.” Tr. 35-36 (Bauer). To exit the office, Bauer had to “scoot” through the narrow space between Taylor and the desk. Tr. 36 (Bauer). As Bauer exited the office, he noticed that there were some non-unit engineers in the area. Tr. 49 (Bauer).

As can be expected, Bell and Taylor remember this meeting slightly differently, although their stories have changed over time. Bell testified that the meeting ended when Bauer “stood up from his chair, and he went over top of Benny so Benny had to kind of sit back like this, and he was over top of him pointing, saying, ‘Fuck you, fuck you, Benny, fuck you, Benny Taylor,’” then said it a “couple more times as he’s leaving” so that it could be heard outside the office. Tr.

80-81 (Bell). However, in the witness statement that she wrote very soon after the meeting, she said that Bauer merely “got closer” to Taylor, she made no mention of the “couple more” fuck-yous as he was leaving, and made no mention of the statement being heard outside the office. R Ex. 3.

Similarly, although Taylor testified that he put his hands up “just in case” Bauer came after him and that he had to lean back in his chair (Tr. 114-115 (Taylor)), the witness statement that he wrote the day after the incident states that he merely “sat in my chair calmly.” R Ex. 7.

E. Nexteer takes no immediate action against Bauer, even though it would later claim that his violation was severe enough for discharge.

After the meeting, Bell, an experienced HR professional, testified that she “didn’t know what to do.” Tr. 82 (Bell). She and Taylor did not call security or the police. Tr. 93 (Bell), 127-128 (Taylor). They did not suspend Bauer pending an investigation. Tr. 93 (Bell), 128 (Taylor). Instead, Bell called HR Manager Pruitt. They scheduled a follow up meeting for the same day with Bell, Pruitt, HR Director of North America Tony Bierman, and in-house counsel Tamika Frimpong. Tr. 82 (Bell). Together, they decided not to call security or the police and not to suspend Bauer pending an investigation. Tr. 183 (Pruitt). Pruitt testified that, based on his understanding of the situation, he did not think that Bauer was an immediate danger to himself or others. Tr. 186 (Pruitt). Accordingly, the HR professional, the HR Manager, the HR director, and the company lawyer decided to allow Bauer to continue to continue to work in the facility so that they could “continue investigating.” Tr. 83 (Bell). It is worth noting that, typically, when an employee is suspected of workplace violence or threatening another employee at Nexteer, he or she is suspended pending an investigation. Tr. 39 (Bauer), 66-67 (Frost).

Nexteer’s “additional investigation” involved having Bell and Taylor write out witness statements (R Ex. 3, 7) and having Bell perform a disciplinary interview with Bauer. She

attempted to schedule the interview for December 14, but Bauer had prior engagements, so it was scheduled for December 15. Tr. 37 (Bauer). Bell's notes from the interview reference Shop Rule 9 which prohibits, "Assaulting, threatening, intimidating, coercing or interfering with supervision." R Ex. 4. However, during the interview, the only supposedly violative behavior that Bauer is asked about is "yelling" and "pointing." R Ex. 4. At some point, Bell raised the additional issue of the Workplace Violence and Harassment policies. Bauer responded by saying, "I don't see how that is relevant to what we're talking about or this incident." R. Ex. 4. The last substantive exchange is as follows:

Did you yell at Benny Taylor? What was said?

Answer: I raised my voice.

What was said?

Answer: Words

Why were those words used?

Answer: Both members of Management were failing to acknowledge the Union wanting a safe and sanitary work environment. I was trying to defend my Union members.

R Ex. 4.

The disciplinary interview on December 15 appears to be the last act taken to investigate the December 13 meeting. However, Bauer was not discharged until the end of his shift (Tr. 37 (Bauer)) on December 19, 2017. GC Ex. 5. No action was taken against Bauer until then. Tr. 186 (Pruitt). The stated reason for the discharge was that Bauer violated Shop Rule 9 and Nexteer's workplace violence policy. GC Ex. 5. Bell stated that, even though Nexteer recognizes progressive discipline procedures, she skipped to the final step – termination, because of the seriousness of the offense. Tr. 99 (Bell).

III. ARGUMENT

Bauer prevails whether this case is analyzed under an Atlantic Steel framework or a Wright Line framework. Under Atlantic Steel, Bauer was a union representative engaged in protected activity during the December 13 meeting, and his outburst was not so egregious as to cause him to lose protection of the Act. Alternatively, under Wright Line, Bauer was engaged in protected activity by filing unfair labor practice charges and seeing those charges through until settlement. Nexteer was aware of those charges and displayed evidence of animus as a result. Then, Nexteer terminated Bauer under circumstances that deviate from its normal procedures, and its argument, that the termination is legitimate, is transparently pretextual. For these reasons, Nexteer has violated the NLRA.

A. Bauer was acting as a Union representative and his actions were not so egregious as to lose protection of the Act.

“Under well-established law, a four-factor balancing test applies where, as here, we must determine whether an employee acting in a representative capacity lost the protection of the Act on account of her outburst during an otherwise statutorily protected grievance discussion with the employer.” United States Postal Serv. & Am. Postal Workers Union, Afl-Cio, Portland Oregon Area Local 128, 364 NLRB No. 62 (July 29, 2016) (citing Postal Serv., 360 NLRB 677, fn. 2, 7-8 (2014), and Atlantic Steel Co., 245 NLRB 814 (1979)). The four factors to be balanced are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's misconduct or unfair labor practice. Atlantic Steel, 245 NLRB at 816.

In the present case, Bauer was acting in his capacity as a union representative during the December 13, 2017 meeting. The meeting was set up to address specific grievances over workplace issues, and those issues were, in fact, discussed during the meeting. The employer

may argue that the December 13, 2017 meeting was only to address Bauer's personal issues. This argument ignores the facts of the case.

When Bauer returned to work after his illegal suspension was rescinded, and the notice posting went up, supervision began to threaten him with removal from the plant, refused to take grievances that he filed seriously, or avoided him altogether. To remedy these issues of Bauer's access to the plants and ability to have his grievances heard (and to resolve the underlying workplace issues surrounding those grievances), Bauer and Frost met with Pruitt and Bell. The result of that meeting was that the December 13 meeting was arranged to better address the issues. At the December 13 meeting, workplace issues such as Bauer's access to the plant, staffing issues, management performing unit work, and health and safety issues were all discussed. These issues were not personal gripes but issues that affect the unit as a whole, and Taylor testified that he understood Bauer was addressing the concerns of the membership. Bauer's conduct was squarely within the definition of representational, and therefore, protected under the NLRA.

1. The Atlantic Steel factors favor Bauer.

Because Bauer was acting in a representational capacity, the Atlantic Steel factors must be examined:

- i. The meeting took place in a private HR office, away from the production area, and there is no evidence that the outburst was heard by other employees, impeded production, or undermined discipline.

Since the incident took place during a private meeting with only supervisors present, in an HR office, the first factor favors Bauer. In Stanford New York, LLC, 344 NLRB 558 (2005), the NLRB found that the first factor weighed in favor of protection when an outburst occurred away from the normal working area and no other employees were present at the beginning of the

meeting. 344 NLRB at 558. Even when another employee entered the area towards the end of the meeting and heard part of the outburst, the factor favored protection. Id.

In Meyer Tool, Inc. & William Cannon-El III, 366 NLRB No. 32 (Mar. 9, 2018), the exchange at issue occurred in the company's HR department, in a separate building, away from production areas. 366 NLRB No. 32. The ALJ found, and the NLRB affirmed that, "akin to grievance meetings, a human resources department is a forum in which employees should be afforded greater latitude to express their views." Id. The opinion continues to hold that even though the outburst had no effect on production, it did occur in the presence of other HR employees who heard loud voices and saw the employee in the hallway. Id. One of these other HR employees later reported to the employer that it caused her to feel unsafe. Id. All of the other employees continued working, with their doors open. Id. Based on the overall evidence, the circumstances favored protection. Id.

In Overnite Transp. Co. & Teamsters Local 667, Affiliated with the Int'l Bhd. of Teamsters, 343 NLRB 1431 (2004), the outburst in question took place in work areas, on work time, and at the instigation of the employee in question. Overnite Transportation, 343 NLRB at 1437. However, the factor favored protection because there was no evidence that other employees actually heard the exchange, that production was affected, or that supervision was undermined. Id.

In the present case, it is undisputed that the meeting took place in an HR office, away from the production line, largely behind closed doors, that some non-unit engineers worked outside of the HR office, and that when Bauer left the office, he saw some engineers in the area. There is a dispute as to what was said after the door was opened, how loud it was said, and if Bauer continued his outburst as he was leaving the office. However, the disputed facts are of

little consequence because Nexteer has not produced any evidence, whatsoever, that anyone other than Bell and Taylor heard the outburst, or that the outburst affected production or managerial control in any way. For these reasons, the first factor favors Bauer.

ii. The subject matter of the discussion involved important workplace issues.

Since the meeting was held in order to discuss important workplace issues, and those issues were, in fact, discussed, the second factor favors Bauer. When a meeting seeks to discuss or file grievances on behalf of unit employees, the meeting goes to the heart of collective bargaining and this factor weighs strongly in favor of continued protection. United States Postal Serv. & Nat'l Ass'n of Letter Carriers Branch 11, 360 NLRB 677, 683 (2014). Even in the absence of a grievance, the second factor favors protection when the subject matter involves “employee complaints about terms and conditions of employment.” Datwyler Rubber & Plastics, Inc., 350 NLRB 669, 670 (2007).

In this case, the record is unclear as to whether the discussions during the December 13 meeting involved already-filed grievances. However, the record is clear that the discussions involved important workplace issues such as staffing, health and safety, and contractual violations such as management performing unit work. Therefore, the second factor favors protection.

iii. The outburst was not so egregious as to lose protection of the NLRA.

“The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity.” United States Postal Serv. & Am. Postal Workers Union, Afl-Cio, Portland Oregon Area Local 128, 364 NLRB No. 62 (citing Hawaii Tribune-Herald, 356 NLRB 661, 680 (2011), *enfd.* 677 F.3d 1241 (D.C. Cir. 2012);

accord Noble Metal Processing, Inc., 346 NLRB 795, 799 (2006)). Indeed, “a certain amount of salty language and defiance” is to be expected and “must be tolerated” in disputes over employees' terms and conditions of employment. Id. (citing Severance Tool Industries, 301 NLRB 1166, 1170 (1991), *enfd. mem.* 953 F.2d 1384 (6th Cir. 1992)). This is especially true when there are no real threats of violence.

In Portland Oregon Area Local 128, cited above, the employee in question, at the end of a grievance meeting, stood up, declared that she could do and say what she wanted, pointed at the supervisor, and took two steps towards the supervisor as the supervisor left the room. She never sought to touch the supervisor or prevent her from leaving, nor did she pursue the supervisor as she left.

The present case is remarkably similar. Even accepting Nexteer’s version of the facts, the incident was brief and spontaneous, it involved Bauer standing up, leaning toward Taylor and pointing at him, saying “fuck you” several times, and then leaving. Bauer and Taylor were very close to each other during this incident, but that was a function of the office, where the meeting took place, being very small. There are no allegations of any verbal threats or any actual violence. The only arguably “threatening or intimidating” behavior that occurred was that Bauer was generally agitated throughout the meeting, and got close to Taylor as he “scooted” by him to leave the room. This is not the type of extreme behavior which Atlantic Steel removed from the realm of protected activity. Thus, the third factor favors Bauer.

iv. Nexteer provoked Bauer.

The last factor is provocation by the employer's unfair labor practices. This factor does not require that the employer's conduct be explicitly alleged as an unfair labor practice as long as the conduct evinces an intent to interfere with protected rights. United States Postal Serv. & Nat'l

Ass'n of Letter Carriers Branch 11, 360 NLRB 677, 684 (2014) (citing Network Dynamics Cabling, Inc., 351 NLRB 1423, 1429 (2007) and Overnite Transportation Co., 343 NLRB 1431, 1438 (2004).

In Letter Carriers Branch 11, a new union steward tried to file grievances and the manager refused. About a week later, the steward tried again, and the manager refused again and ordered the steward to go back to work. The situation then became heated and involved some yelling and pointing by the steward (which the employer attempted to characterize as “threatening”), and the manager called the police on the steward. The ALJ held, and the NLRB affirmed, that the steward was protected under all four Atlantic Steel factors. Specifically, with regard to the provocation factor, the opinion held that, especially in light of the antagonism that the manager showed to the steward on the first attempt to file grievances, the manager’s conduct toward him on the second attempt evinced an attitude of interfering with the steward’s duty to investigate potential grievances and therefore amounted to provocation.

The present case is similar. The December 13 meeting was the end of a months long chain of events, beginning with Nexteer’s illegal suspension of Bauer. When he returned to work after the NLRB settlement, managers called Bauer an “asshole,” said that his grievances were “bullshit,” or refused to meet with him regarding grievances. When Bauer and Frost raised these issues with Pruitt and Bell, they both made comments about Bauer’s previous NLRB activity, but agreed to set up a follow up meeting with Bell and Taylor to discuss Bauer’s issues. The December 13 meeting, which occurred more than one month after the meeting with Pruitt, started with a calm personal conversation between Bauer and Taylor, but as the discussion on workplace issues began, Bauer became agitated. The meeting ended when Taylor made the flippant comment about Bauer, “This is why we can’t get anything done on third shift; he’s just so

hostile.” Perhaps, if taken in isolation, this comment would not be seen as particularly provocative, but it is the proverbial straw that broke the camel’s back after months of Nexteer refusing to meet with Bauer, refusing to hear his grievances, and generally being hostile to him after he asserted his rights under the NLRA. For these reasons, the fourth factor also favors protection.

2. All four factors are not necessary to a finding in favor of Bauer.

As discussed above, all four Atlantic Steel factors favor Bauer. However, it is important to note that all four factors are not necessary for Bauer to prevail. Instead, the NLRB weighs all four factors together to determine if the protection of the NLRA is lost. If a factor weighs against protection, an employee may still prevail if the other factors weigh strongly in favor of protection. Felix Industries, 339 NLRB 195, 196 (2003).

B. Under a Wright Line analysis, Bauer also prevails.

Section 8(a)(4) of the NLRA makes it unlawful for an employer to discriminate against an employee because he has filed charges or given testimony under the Act. 29 U.S.C. § 158(a)(4). The NLRB analyzes such allegations under the framework established in Wright Line. Newcor Bay City Division, 351 NLRB 1034, 1034 fn. 4 (2007) (citing Wright Line, 251 NLRB 1083 (1980)). Under this framework, it is the General Counsel's burden to establish a prima facie case of discriminatory motivation by proving the existence of protected activity, the respondent's knowledge of that activity, and the respondent's animus against that activity. See Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004) (citing Wright Line, 251 NLRB at 1089). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. Allied Mechanical II, 349 NLRB 1327, 1328 (2007). It is not enough for the employer to

articulate a legitimate, non-discriminatory reason for its actions. Instead, it must affirmatively introduce enough evidence to persuade the NLRB that it would have taken the same action regardless of the employee's protected activity, and the employer's anti-union animus. Hyatt Regency Memphis, 296 NLRB 259 (1989).

In this case, the employer has failed to meet its burden.

1. The General Counsel has established a prima facie case.

In the present case, the existence of protected activity has been shown. As discussed above, at the December 13 meeting, Bauer was acting as a union representative to address grievances or other workplace issues that affected the employees whom he represents. Further, it is undisputed that Bauer previously filed unfair labor practices against Nexteer.

Nexteer's knowledge of the protected activity has also been shown. The December 13 meeting was arranged as a result of a previous meeting between Bauer, Frost, Bell, and Pruitt. Bauer and Frost both testified that, at that previous meeting, Pruitt and Bell both made comments to Bauer about his previous filings with the NLRB. Pruitt testified that he was aware of Bauer's previous NLRB charges and that he took part in the decision to terminate Bauer. Further, Bauer's previous charges were settled and included a posting, after which other members of management began to make comments toward Bauer.

Nexteer's anti-union animus has also been shown. First, it illegally attempted to suspend Bauer, and then settled those charges. GC Ex. 4. When the posting related to that settlement went up, Nexteer's managers began to comment on it and started to discriminate against Bauer, both by calling him names or threatening him, and by avoiding him and refusing to hear his grievances. When the Union went to Pruitt and Bell to resolve this issue, they both made negative comments about the previous NLRB charges.

Further, the circumstances around Bauer's discharge itself reveals Nexteer's animus. Deviations from established procedures for discharge, including progressive discipline, is evidence of an unlawful motive. Wells Blue Bunny, 287 NLRB 827, 833 (1987). In the present case, Bell acknowledged that there is a progressive discipline procedure, but that Nexteer declined to follow it because of the severity of the offense. However, as Bauer and Frost both testified, Nexteer responds to serious violations of the workplace violence policy by immediately suspending the offender, pending an investigation. Nexteer did not call the police or even its internal security. It did not suspend Bauer, and instead let him work in the plant for a week before he was terminated. Pruitt, after being told about the December 13 meeting, admits that he did not consider Bauer to be a threat. In other words, immediately after the December 13 meeting, Nexteer acted as if Bauer's outburst was relatively minor – perhaps properly fitting into the lower levels of the progressive discipline procedure (certainly short of discharge). However, sometime during that week, after consulting with higher-up management (who admits to having knowledge of Bauer's NLRB activity) and Nexteer's lawyers, the relatively minor, non-threatening outburst was converted into an incident worthy of discharge. Such a timeline implicates animus.

As more evidence of Nexteer deviating from its established practice, there is the matter of Bauer's previous discipline. The CBA is very clear on this subject: "*Management will not take into account* any prior infractions which occurred more than twenty-four months previously" and "*Management will eliminate from an employee's record* any infraction where there was a lapse of time of greater than 18 months between infractions provided the employee has not been on leave of absence the majority of the time between the infractions." GC Ex. 2, p. 32. (emphasis added).

Nexteer, at the hearing and in its pre-complaint position statement to NLRB Region 7, spent a great deal of time talking about Bauer's previous disciplines, even though they occurred more than twenty-four months before December 2017. At the hearing, Nexteer's counsel stated that the prior disciplines were to be used, not as evidence of progressive discipline, but as evidence of a "pattern of behavior." Tr. 57. Further, Nexteer's position statement claims, "His behavior reflects not an isolated loss of composure but rather a chronic and calculated campaign of unacceptable conduct." GC. Ex. 12, p. 4.

This is exactly the type of employer behavior which the CBA prohibits. The CBA *does not* state that Nexteer may use old disciplines for some purposes but not others, *nor* does it state that previous disciplines will be removed from the employee's file unless they are needed as evidence in ULP proceedings. *Instead*, the CBA is clear that disciplines older than twenty-four months should not be used against any employee. In this case, even though Nexteer claims to have skipped to the final step of progressive discipline and did not consider previous disciplines, it has acted otherwise. Such actions further give rise to an inference of animus.

2. Nexteer has failed to meet its burden.

Since the General Counsel has established a prima facie case, Nexteer must show that it would have taken the same actions, absent Bauer's protected activity and Nexteer's animus. It has failed to do so.

In support of its position that it legitimately terminated Bauer in violation of Nexteer's workplace violence policy, Nexteer offers its Exhibit 24, which are "other examples of termination." Tr. 159. The Exhibit includes terminations of union employees (subject to the grievance procedure), non-union employees, and outside contractors. No evidence was presented as to whether the union employees grieved their terminations or otherwise had their terminations

reduced, and no evidence was presented as to what, if any, progressive discipline was used for these employees. Lack of a complete record aside, the documents, themselves, do not support their purported use:

- Starnesha Hood was discharged for sending texts to a co-worker saying that she would “beat the fuck out of (her coworker).” There is no evidence that Bauer made threats of this nature.
- David McCarthy was discharged for violation of Workplace Violence Prevention Policy. The letter states that he is an “at-will” employee, and does not describe any facts surrounding the termination.
- Todd Scott was discharged for violation of Workplace Violence Prevention Policy. The letter states that he is an “at-will” employee, and does not describe any facts surrounding the termination.
- Johnny Walser was discharged for making threatening statements toward employees. The nature of the statements is not described.
- Derrick Boykins was apparently an employee of an outside contractor. Nexteer decided to end his contract, and does not specify the reasons.
- Adam Bostwick was discharged for violation of Workplace Violence Prevention Policy. The letter states that he is an “at-will” employee, and does not describe any facts surrounding the termination.

While all of these examples are evidence that Nexteer has, in the past, terminated employees for violation of the workplace violence policy, none provide evidence that these employees were similarly situated to Bauer or that these incidents are comparable to the December 13 meeting. Therefore, while Nexteer has articulated a facially “legitimate” reason for terminating Bauer, it

has not met its burden of showing it would have acted in the same way, absent his protected activity and Nexteer's animus.

Very similarly, in support of its position that it legitimately terminated Bauer, Nexteer offers its Exhibit 25, which are "other terminations of union employees under Shop Rule 9." Tr. 162. Again, there is no evidence of whether the union employees grieved their terminations or otherwise had their terminations reduced, and no evidence of whether progressive discipline was used for these employees. Again, the documents do not support their purported use:

- Eric Brown was discharged for assaulting a member of management. There were witnesses and he admitted to the assault. There are no allegations that Bauer actually assaulted Taylor.
- Jason Chase was discharged for threatening two security officers. The nature of the threats is not described.
- Daniel Williams was discharged for assaulting his group leader. Again, there are no allegations that Bauer actually assaulted Taylor.
- Thomas Darby was discharged for threatening/intimidating his group leader. The nature of the threats is not described.
- James Allen was discharged for throwing water at his supervisor and calling her derogatory and offensive names. There are no allegations that Bauer threw anything at Taylor or called him any names.
- Oscar Williams was discharged for failing to follow a direct order given by three different members of management, causing a scene, and making threatening gestures to members of management. There are no allegations that Bauer failed to follow management's orders except, perhaps, when he was asked to "calm down" during the meeting with Bell and Taylor. As described above, there is no evidence that Bauer "caused a scene" or distracted

the attention of other employees. There are also no allegations that Bauer made threatening gestures other than “pointing.”

- David A. Smith was discharged for making physical contact with and vulgar statements to a member of management. There is no evidence that Bauer made physical contact with Taylor.
- Randall Perry was discharged for making threats and hostile and intimidating gestures to a coworker and supervision. As with much of the above disciplines, the threats and gestures are not described and there is no evidence that Bauer’s actions were comparable to Perry’s.

Again, while these examples are evidence that Nexteer has, in the past, terminated employees for violation of Shop Rule 9, there is no evidence that these employees were similarly situated to Bauer or that these incidents were similar to the December 13 meeting. Therefore, while Nexteer has articulated a facially “legitimate” reason for terminating Bauer, it has not met its burden of showing it would have acted in the same way, absent his protected activity and Nexteer’s animus.

IV. CONCLUSION

For the above-mentioned reasons, Nexteer has violated the NLRA by discharging Bauer. The Charging Party requests the remedies requested in the Complaint along with any other appropriate relief.

Respectfully Submitted,

LOCAL 699, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, UAW

By: _____/s/ Stuart Shoup_____

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Dated: September 24, 2018

CERTIFICATE OF SERVICE

I, Stuart Shoup, hereby certify that I caused a true and correct copy of the foregoing Post-Hearing Brief of the Charging Party to be e-filed with the NLRB Division of Judges, and served via email on the following parties on the date below:

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Dated this 24th day of September, 2018

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